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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 09/774,248
Filing Date: January 30, 2001
Appellant(s): GROSS ET AL.

Sandra Lee
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed August 4, 2006 appealing from the Office action mailed November 2, 2004.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: Claims 7 – 9 are rejected under 35 U.S.C. 103 (a) as obvious over Hammons et al. (US 5,647,863).

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,647,863	HAMMONS et al.	7-1997
5,919,177	GEORGER et al.	7-1999
4,324,247	AZIZ	4-1982
4,842,666	WERENICZ	9-1989

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1 – 6, 10 – 13, 29 – 30 and 35 – 36 are rejected under 35 U.S.C. 102(b) as being anticipated by Hammons et al. (US 5,647,863).

With reference to claim 1, Hammons et al. (hereinafter "Hammons") discloses an absorbent core (abstract) comprising an acquisition layer (38), a storage layer (44) having absorbent capacity (col. 9, lines 10 – 18), disposed beneath and in fluid communication with the acquisition layer (figure 3) and a wicking layer (46,48) disposed beneath and in fluid communication with the storage layer (figure 3), comprising compressible hardwood pulp (col. 12, lines 16 – 28) and having a density of between about 0.05 and about 0.4 g/cc (col. 15, lines 3 – 6) where the ratio of the vertical wicking

height of the wicking layer to the vertical wicking height of the storage layer is equal to or greater than 1.25 as set forth in col. 11, lines 11 – 15.

As to claim 2, Hammons discloses the vertical wicking height to be greater than 3.0 as set forth in col. 11, lines 19 – 22.

With reference to claims 3 – 4, Hammons discloses the use of eucalyptus as set forth in col. 12, lines 16 – 28.

As to claim 5, Hammons discloses the wicking layer further comprising chemically treated softwood fibers as set forth in col. 11, lines 53 – 66.

With reference to claim 6, Hammons discloses the wicking layer being imprinted with a compression pattern as set forth in col. 10, lines 40 – 52.

With respect to claim 10, Hammons discloses an absorbent core wherein the wicking layer has a density of between 0.1 and 0.3 g/cc as set forth in col. 15, lines 3 – 5.

With respect to claim 11, the examiner notes the product by process language and reminds the applicant that:

"[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) (citations omitted) (

Additionally, Hammons discloses a unitary absorbent core as set forth in figure 3.

Regarding claim 12, Hammons discloses an absorbent article comprising a liquid permeable top sheet (col. 6, lines 64 – 67), a liquid impermeable back sheet (40) and an absorbent core disposed between the topsheet and the backsheet, comprising an

acquisition layer (38), a storage layer (44) having absorbent capacity (col. 9, lines 10 – 18), disposed beneath and in fluid communication with the acquisition layer (figure 3) and a wicking layer (46) disposed beneath and in fluid communication with the storage layer (figure 3), comprising compressible hardwood pulp (col. 12, lines 16 – 28) and having a density of between about 0.05 and about 0.4 g/cc (col. 15, lines 3 – 6) where the ratio of the vertical wicking height of the wicking layer to the vertical wicking height of the storage layer is equal to or greater than 1.25 as set forth in col. 11, lines 11 – 15.

As to claim 13, Hammons discloses the claimed articles as set forth in col. 3, lines 49 – 53.

Regarding claim 29, Hammons discloses an absorbent core (42) comprising an acquisition layer (44), a storage layer (48) having absorbent capacity (col. 14, lines 63 – 66), disposed beneath and in fluid communication with the acquisition layer (col. 13, lines 10 – 16) and a wicking layer (46) disposed beneath and in fluid communication with the storage layer (figure 2), comprising compressible hardwood pulp as set forth in col. 12, lines 16 – 28.

Hammons discloses that the storage layer has an absorbent capacity by disclosing that the storage layer (48) is formed from the same materials as the acquisition layer. As disclosed in col. 9, lines 10 – 19, the acquisition layer may be formed from cellulosic fibers, which possesses absorptive properties. Likewise, in col. 7, lines 53 – 57, Hammons discloses that the acquisition layer temporarily stores fluid.

With reference to claim 30, Hammons discloses an absorbent core wherein the wicking layer (46) comprises from about 50% by weight to about 99.9% by weight of hardwood fibers (col. 12, lines 25 – 26) and from about 0.1% by weight to about 50% by weight synthetic fibers (col. 23, lines 35 – 36), the storage layer (48) including synthetic fibers (col. 14, lines 63 – 66 and col. 9, lines 10 – 13) and having a density of between about 0.05 and about 0.25 g/cc (col. 14, lines 63 – 66 and col. 8, lines 59 – 61) and the acquisition layer (44) includes synthetic fibers (col. 9, lines 10 – 13) and has a density of between 0.04 to 0.1g/cc as set forth in col. 8, lines 59 – 61.

As to claim 35, Hammons discloses an absorbent core (42) comprising an acquisition layer (44), a storage layer (48) having absorbent capacity (col. 14, lines 63 – 66), disposed beneath and in fluid communication with the acquisition layer (figure 2) and a web imprinted wicking layer (46) disposed beneath and in fluid communication with the storage layer (figure 2), comprising compressible wood pulp (col. 12, lines 16 – 28) in which there is a pattern of densified regions and less densified regions as set forth in col. .

In col. 10, lines 40 – 48, Hammons incorporates Werenicz (US 4,842,666) which discloses the adhesive as a fine web of extremely thin filaments (col. 2, lines 50 – 58) thereby providing a web imprinted layer. Further, Hammons discloses that heat and/or pressure bonds may be used (col. 10, lines 48 – 52) which would provide the layer with a pattern of densified regions (wherever pressure and/or heat bonds exist) and less densified regions (areas that have not been heat/pressure bonded).

With reference to claim 36, Hammons discloses an absorbent core wherein the wicking layer (46) comprises from about 50% by weight to about 99.9% by weight of wood fibers (col. 12, lines 25 – 26) and from about 0.1% by weight to about 50% by weight synthetic fibers (col. 23, lines 35 – 36), the storage layer (48) including synthetic fibers (col. 14, lines 63 – 66 and col. 9, lines 10 – 13) and having a density of between about 0.05 and about 0.25 g/cc (col. 14, lines 63 – 66 and col. 8, lines 59 – 61) and the acquisition layer (44) includes synthetic fibers (col. 9, lines 10 – 13) and has a density of between 0.04 to 0.1g/cc as set forth in col. 8, lines 59 – 61.

Claims 7 – 9 are rejected under 35 U.S.C. 103(a) as obvious over Hammons et al. (US 5,647,863).

The difference between Hammons and claims 7 – 9 is the provision that the rewet value of the core is numerically defined.

Hammons teaches a core with low rewet characteristics (col. 5, lines 17 – 19) but fails to associate a numerical value with the rewet characteristic.

However, it well known in the art that a low rewet value generally corresponds to a rewet value of less than 1 gram. See, for example, col. 6, lines 23 – 24 of Georger et al. (US 5,919,177) and col. 6, lines 36 – 37 and Table 1 of Aziz (US 4,324,247).

It would have been obvious to one of ordinary skill in the art to consider the low rewet value of Hammons as being comparable to less than 1 gram since it has been established in the prior art that a low rewet value is equivalent to 1 gram or less.

(10) Response to Argument

Initially, in response to the appellant's statement that the term "physically independent" was agreed upon on page 2 of the Appeal Brief filed June 24, 2005 in the section under Status of Amendments, the examiner notes that that appellant suggested proposed claim language. The examiner never "agreed" on any proposed language. The appellant suggested that the claims may be amended to reflect this alleged distinction and the examiner suggested that the appellant reference the drawings in addition to the specification to support the proposed amendment as stated in the interview summary dated January 31, 2005. Likewise, the examiner did not request resubmission of any documentation. The appellant was made aware of the fact that the information disclosure statements filed 5/21/01 and 7/12/01 failed to comply with 37 CFR 1.98(a)(1), and that the information therein had not been considered.

In response to appellant's argument that the references fail to show certain features of appellant's invention, it is noted that the features upon which appellant relies (i.e., a separate independent wicking layer) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Regarding the appellant's disagreement with the examiner's interpretation of the Hammons reference, the examiner believes that the appellant has misunderstood

Likewise, the examiner notes that the case law cited refers to dependent claims. In the instant application, the examiner is not required to provide support on a position

for interpreting claims differently since the claims in question are independent claims which is defined as a claim that does not refer back or depend from another claim. If the claim does not refer back or depend on another claim, how can the examiner be limited to an interpretation given for a separate and distinct claim? The appellant argues that the layer of Hammons that have been equated to the layers of the claimed invention serve very different functions, but the examiner disagrees. Each layer of Hammons used to reject the claims of the instant application at a minimum serve the function of the claimed layer consistent with the definition of such layer in the specification of the instant application. During patent examination, the claims are given the broadest reasonable interpretation consistent with the specification, and all subject matter that is the equivalent of the subject matter as defined in the claim, even though specifically different from the definition in the claim, must be considered unless expressly excluded by the claimed subject matter. MPEP 904.01

In response to the appellant's argument that the layers as designated by the examiner do not correspond to the layers as designated by the appellant, the examiner contends that the names given to the layers are just that. The examiner is not limited to using the same names to describe the layers as the Hammons, the inventor. If the layer that Hammons calls the acquisition layer is capable of receiving bodily fluids, then this layer may also be deemed a topsheet. Likewise, if the layer that Hammons refers to a s storage/distribution layer and/or indicator layer is capable of transporting fluids quickly, then it may also be deemed a wicking layer.

The examiner has acknowledged that the layers of the claimed invention are separate, though not absolutely necessary since a layer may be considered as a zone, a thickness, etc. In any event, the examiner likewise uses separate "layer" to meet the claimed invention, including the storage layer (indicated by reference character "44" of Hammons) and the wicking layer (indicated by reference characters "46","48" of Hammons).

In response to appellant's argument that there is no suggestion to combine the references, the examiner notes that there is no rejection under 35 USC § 103 as obvious over Hammons in view of Georger and Aziz. The applicant's arguments are not commensurate with the outstanding rejection. Hammons is relied upon as teaching a core with low rewet characteristics (col. 5, lines 17 – 19). The core is not limited to any particular arrangement since Hammons notes that the core comprises certain layers, not consists of them. Further, it is well known in the art that a "layer" may be considered as a zone, a thickness, etc.

Georger and Aziz are provided as an illustration as to which numerical values can reasonably correspond to a "low" rewet value, not to modify the Hammons reference.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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Primary Examiner

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